89- 1599.

No. _____

In The

Supreme Court of the United States

October Term, 1989

LANGAN ENGINEERING ASSOCIATES, INC.,

Petitioner,

vs.

21ST PHOENIX CORPORATION, formerly known as THE HANSON DEVELOPMENT COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RICHARD F. HAYSE
HAYSE LAW OFFICES
914 Merchants National
Bank Bldg.
Topeka, Kansas 66612
(913) 232-2662

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does a federal court in a diversity case have subject matter jurisdiction to decide a state law construction damages dispute between a non-diverse third party plaintiff and third party defendant, when that dispute is not logically dependent on the outcome of the plaintiff's claims against defendant which have been previously settled?

PARTIES

Plaintiff in the courts below was King Fisher Marine Service, Inc., a Texas corporation. Petitioner believes this party has no further interest in the outcome of this petition.

Defendant in the courts below was the Hanson Development Company, a Delaware corporation, which has since changed its name to 21st Phoenix Corporation, respondent herein. For continuity it will be referred to as Hanson in this petition. It is also third party plaintiff in the lower courts.

Petitioner herein, Langan Engineering Associates, Inc., became a party to the case in district court as a third party defendant on the petition of Hanson. That petition also named Highlands Insurance Company, a Texas corporation, as third party defendant. Petitioner believes Highlands has no further interest in the outcome of this petition.

Hanson and Langan are both residents of the State of New Jersey for diversity purposes.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Langan Engineering Associates, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on January 10, 1990.

OPINION BELOW

The opinion of the Tenth Circuit Court of Appeals, 893 F.2d 1155, appears in the Appendix hereto, beginning at page 3. The opinion of the U.S. District Court for the

District of Kansas, 717 F.Supp. 727, which was the subject of the appeal to the Tenth Circuit Court of Appeals, is also included in the Appendix, beginning at page 45.

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals sought to be reviewed by this court was entered on January 10, 1990, and this Petition for Writ of Certiorari was filed within 90 days of that date. There was no motion for rehearing. Jurisdiction in this Court to review the judgment of the Court of Appeals is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article III, § 2:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority: . . . – to Controversies . . . between citizens of different States; . . . .

United States Code, Title 28:

§ 1332. Diversity of citizenship: Amount in controversy

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between:

(1) Citizens of different States; . . . .

United States Code, Title 28:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

* * *

STATEMENT OF THE CASE

This construction claim litigation arose out of a contract between plaintiff King Fisher Marine Service, Inc.

(King Fisher) and defendant Hanson Development Company (Hanson) for the filling of a lake in conjunction with the building of a shopping center in Wichita, Kansas. On or about August 30, 1971 Hanson and King Fisher entered into a "site fill agreement" which provided that the fill work by King Fisher would be subject to the written approval of petitioner Langan Engineering Associates (Langan), designated as Hanson's representative under the agreement. The work was to be performed for a stipulated contract price and was to be completed within seven months from the date of written direction from Hanson to commence the work.

Problems developed concerning King Fisher's timely completion of the fill. An addendum to the site fill agreement was executed concerning extra fill which would be required because of an increased finished elevation. The contract addendum provided no firm completion date, but stated that King Fisher would "make effort to have this completed by August 1st [1972]."

After completion of the performance required by the site fill agreement and the addendum, King Fisher submitted a request for final payment to Hanson. The amount of the final payment requested was $64,836.80, the amount of the stipulated price which had not been paid in full. Hanson refused payment, and King Fisher brought suit in the District Court of Sedgwick County, Kansas on November 28, 1972. The petition alleged that King Fisher had performed its obligation under the site fill agreement and addendum and that the amount of $64,836.80 remained due and owing by defendant Hanson. King Fisher also prayed for an increase in the contract price of $16,974.00 based upon mutual mistake as to

the amount of fill to be pumped. Further, King Fisher prayed for $45,867.50, alleging "the conduct of defendant caused delays and expenses and additional equipment not contemplated by the contract." Plaintiff's total claim was for $127,678.30.

Defendant Hanson timely removed the action to the United States District Court for the District of Kansas. (Doc. 1, Petition for Removal, 12/26/72). Jurisdiction was premised upon diversity of citizenship, as Hanson was a Delaware corporation with principal place of business in New Jersey and King Fisher was a Texas corporation with principal place of business in Texas. (*Id.*) Hanson filed its answer and counterclaim on February 1, 1973, denying King Fisher's claim for contractual relief and asserting a delay counterclaim against King Fisher in the amount of $136,395.60. (Doc. 10, Answer and Counterclaim, 2/1/73).

Nearly a year after removal, Hanson asked for leave to file an amended answer, counterclaim, and third party complaint in order to implead King Fisher's surety, Highlands Insurance Company, and petitioner Langan. (Doc. 14, Defendant's Motion, 12/10/73). Leave was granted. (Doc. 18, Order, 12/19/73). The allegations by third party plaintiff Hanson against third party defendant Langan were essentially in two counts. First, in the event Hanson was found liable to King Fisher on its breach of contract claims, Hanson prayed for judgment over against third party defendant Langan in the amount of plaintiff's claim, $127,678.30, under a theory of breach of contract by Langan. (Doc. 19, Amended Answer, Amended Counterclaim and Third Party Complaint, 12/27/73, Third Party Complaint, 5 and 6). The second claim of the third party complaint against Langan was a "delay" claim for

$136,395.60 alleged to be the amount of damages resulting to third party plaintiff Hanson as a result of delays in the completion of the hydraulic fill contract. (*Id.*, 7 and 8).

Third party defendant Langan answered, denying liability, and asserted a complaint against plaintiff King Fisher, alleging that in the event Langan were held liable to Hanson, plaintiff should answer over to Langan for those damages. (Doc. 26, Answer, 4/1/74). Third party plaintiff Hanson also sought to recover the same "delay" damages ($136,395.60) from plaintiff King Fisher and/or third party defendant Highlands Insurance Company, which supplied the performance bond for King Fisher. (Doc. 19, Amended Answer, Amended Counterclaim and Third Party Complaint, 12/27/73, Count II). By amended pleading the "delay" damages were increased to $155,703.60. (Doc. 66, Second Amended Answer, Amended Counterclaim and Third Party Complaint, 7/25/77).

Throughout the pretrial proceedings, the court recognized only the first of the two claims against third-party defendant Langan. In the order permitting filing of the third-party complaint, Judge Templer stated, "Defendant Hanson also seeks to bring in as a third party defendant the Langan Engineering Associates, Inc., claiming in substance, that such party is or may be liable over to Hanson for all or part of plaintiff's claim against it." (Doc. 18, Order, 12/18/73). Magistrate Judge Miller, in a Memorandum summarizing a partial pretrial conference on July 3, 1974, stated, "By way of third party Complaint, [Hanson] seeks to recover over as against Langan the amount of any judgment which plaintiff secures against Hanson."

(Doc. 28, Partial Pretrial, 7/3/74, p. 2). In the final pretrial order entered by Judge Rogers, the court again outlined the claim by Hanson against Langan as a claim to recover in the event Hanson was found liable to King Fisher, without mention of the second aspect of the third party complaint. (Doc. 72, Pretrial Order, 8/1/77).

Pursuant to the Pretrial Order, King Fisher was to provide information supporting its position that the conduct of Hanson caused delays and expenses and additional equipment not contemplated by the contract, and for which Hanson should be liable to King Fisher. (Doc. 72, Pretrial Order, 8/1/77, p. 5). King Fisher on July 7, 1977 filed a statement in response to this requirement. (Doc. 64, Information Required by Pretrial Order, 7/7/77, p. 4). Although the word "delay" appears frequently in this statement, none of the claim relates to additional costs of performance occasioned because the fill contractor was on the job longer than the 7-month period anticipated by the original site fill agreement or the performance time in the amendment of that agreement.

Detailed information regarding Hanson's delay claim is found in Hanson's amended answers to interrogatories. (Doc. 67, Amended Answers, 7/25/77, pp. 1-2). These damages are enumerated in six separately stated items of which the mathematical total is $173,703.50; not $155,703.60 as alleged in Hanson's final pleading. (Doc. 66, Second Amended Answer, Amended Counterclaim and Third Party Complaint, 7/25/77). Defendant Hanson sought to recover these delay damages from plaintiff King Fisher through counterclaim premised upon an allegation of breach of the time of performance provision of the fill contract.

The theory for recovery against third party defendant Langan was entirely different. Langan was not a party to the site fill contract. Therefore, Hanson's claim against Langan was premised upon an allegation that Langan made an alleged oral representation that the fill work could be completed in six months. (Doc. 40, Hanson depo., pp. 86-90). Alternatively, Hanson was proceeding on a theory of negligent performance by Langan. (*Id.*)

The matter came on for trial before the court on April 9, 1979. King Fisher and Hanson were represented, but Langan was not, as its counsel had withdrawn. (Doc. 100, Order, 1/24/78; Doc. 102, Order, 2/14/79). It was announced to the court on the record that plaintiff and defendant had reached a settlement whereby judgment was to be entered in favor of plaintiff King Fisher against defendant Hanson in the amount of $60,000. (Doc. 130, Transcript of Proceedings, 4/9/79, p. 3). This amount was for the amount due and owing to King Fisher under the site fill agreement. Discovery had established that defendant Hanson did not dispute that the work had been done and that the full contract price had not been paid. Defendant Hanson had previously been granted summary judgment on plaintiff's second count for mutual mistake. (Doc. 97, Order, 12/15/77). The counterclaim by Hanson against King Fisher was dismissed with prejudice, as was Hanson's third party claim against Highlands Insurance Company. (Doc. 130, Transcript of Proceedings, 4/9/79, pp. 3-4; Doc. 104, Order, 4/11/79, p. 2).

After approving the foregoing settlement, the court proceeded to consider the only remaining issues, Hanson's claims against third party defendant Langan, even

though Langan was not represented. Hanson offered "evidence" in the form of exhibits, depositions, and answers to interrogatories. (Doc. 130, Transcript of Proceedings, 4/9/79, p. 5). Hanson moved for judgment against Langan under both claims of its third party complaint, the "pass through" claim (in the amount of the $60,000 judgment entered against Hanson on the claim of King Fisher), and its delay damages claim (in the amount of $155,703.50). (*Id.* at pp. 5-8).

In fact, the evidence offered failed to support the amount of judgment requested. The damages enumerated by counsel for Hanson totaled $158,602.50, not $155,703.50 as indicated by counsel. (Doc. 130, Transcript of Proceedings, 4/9/79, p. 8). The amended answers to interrogatories submitted to the court (*Id.* at p. 5) list damages in the amount of $173,703.50 (Doc. 67, Amended Answers, 7/25/77, pp. 1-2).

The court took the matter under advisement (Doc. 103, 4/9/79) and on April 11, 1979, entered judgment in the amount of $155,703.50, ten cents less than the full amount of the damages claim as stated in Hanson's second amended pleading. (Doc. 105, Judgment, 4/11/79; see Doc. 66, Second Amended Answer, Counterclaim and Third Party Claim, 7/25/77). No judgment was entered on the "pass through" claim, the only claim against Langan by Hanson which had been included in the final pretrial order. (Doc. 105, Judgment, 4/11/79; see Doc. 72, Pretrial Order, 8/1/77).

Nearly four years later, Hanson began execution proceedings in New Jersey against Langan to collect on the judgment. Claiming it had no notice that such a judgment

had been entered, Langan attacked the judgment as invalid under due process and procedural grounds. The trial court denied relief (Doc. 124, Memorandum and Order, 12/16/83), and the Tenth Circuit affirmed (*King Fisher Marine Service, Inc. v. 21st Phoenix Corp., et al.*, Case No. 84-1025, 9/11/85).

The instant proceedings, commenced on November 13, 1985, seek to set aside the $155,703.50 judgment pursuant to F.R.Civ.P. 60(b)(4) on the ground that the judgment was and is void for want of subject matter jurisdiction. (Doc. 139, Motion of Third Party Defendant, 11/13/85). It is undisputed that as between third party plaintiff Hanson and third party defendant Langan there is neither diversity of citizenship nor a federal question to support subject matter jurisdiction. (Appendix, p. 9). Therefore, the judgment can be sustained only if it was within the ancillary jurisdiction of the district court. However, because the judgment was entered on the second claim of the third party complaint, the independent delay claim founded on breach of an oral promise or negligent performance, rather than on the first claim, the pass through claim, Langan argued that the court lacked even ancillary jurisdiction. Hanson contended that because its delay claim on which judgment was entered arose out of the common nucleus of operative facts of the action between plaintiff and defendant, ancillary jurisdiction attached. The district court, in a Memorandum and Order filed September 8, 1987, denied relief. (Doc. 156, Memorandum and Order, 9/8/87; Appendix, p. 45). Langan appealed and the Tenth Circuit Court of Appeals

affirmed, holding that "the district court's ancillary jurisdiction encompassed all of Hanson's third-party claims." (Appendix. p. 41).

BASIS FOR FEDERAL JURISDICTION

As noted above, the case was removed from the state courts of Kansas to the U.S. District Court for the District of Kansas pursuant to the removal statute, 28 U.S.C. § 1441, at a time when the case included only two parties, King Fisher and Hanson, who were of diverse citizenship. 28 U.S.C. § 1332(a)(1). When Hanson added Langan and Highlands Insurance as third party defendants almost a year later, the complaint was premised upon impleader under Fed.R.Civ.P. 14(a), which is not a separate jurisdictional grant.

REASONS FOR ALLOWING THE WRIT

1. The decision below conflicts with decisions of other courts of appeals on the proper scope of ancillary jurisdiction after *Owen Equipment*.

The proper interpretation of this Court's opinion in *Owen Equipment and Erection Company v. Kroger*, 437 U.S. 365, 57 L.Ed.2d 274, 98 S.Ct. 2396 (1978), has been the subject of much dispute among the lower federal courts. Petitioner suggests in the following section of this petition that the decision by the Tenth Circuit in the instant case is in conflict with that opinion. However, for purposes of the present discussion, the conflict among the

circuits is neatly capsulized by the Tenth Circuit opinion in the following terms:

> Appellant [petitioner herein] has interpreted [*Owen Equipment*] as *requiring* "logical dependence" in order to find ancillary jurisdiction of a claim sought to be added. A number of courts are in apparent agreement with that assessment. *See, e.g., National Union Fire Ins. Co. of Pittsburgh, Pa. v. Continental Ill. Corp.*, 661 F. Supp. 964, 969 (N.D. Ill. 1987); *May's Family Centers, Inc. v. Goodman's, Inc.*, 104 F.R.D. 112, 115 (N.D. Ill, 1985); *Dahlberg v. Becker*, 581 F. Supp. 855, 865 (N.D.N.Y. 1984) *aff'd*, 748 F.2d 85 (2nd Cir. 1984) *cert. denied*, 470 U.S. 1084 (1985).
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> * * *
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> The district court in the case at bar . . . acknowledged that "other claims [presumably the delay damages claim] were made which were not logically dependent on the main action, although they were logically related." 717 F. Supp. at 730. But the court believed that a logical relationship, without "dependence," is sufficient to confer subject matter jurisdiction because it permits "the resolution of 'an entire, logically entwined lawsuit.' " *Id.* Other courts have reached similar conclusions. *E.g., Travelers Ins. Co. v. First Nat'l Bank of Shreveport*, 675 F.2d 633, 638 (5th Cir. 1982) ("key is . . . 'logical relationship' "); *Cumberland Village Hous. Assocs. v. Inhabitants of Cumberland*, 609 F. Supp. 1481, 1486 (D. Me. 1985) (sufficient that claims, although "not necessarily logically dependent," were "tightly intertwined"). *Cf. United States v. City of Twin Falls, Id.*, 806 F.2d 862, 867-68 (9th Cir. 1986) *cert. denied*, 482 U.S. 914 (1987) ("[T]here is a close factual and logical nexus between the pendent claims added under Rule 18(a) and the original claim. Therefore, pendent jurisdiction supports these claims."); *Lykins v.*

> *Pointer Inc.*, 725 F.2d 645, 648 n.2 (11th Cir. 1984) (lack of logical dependence between claims did not defeat ancillary jurisdiction because statute held not to preclude procedural posture of claim); *Eagerton v. Valuations, Inc.*, 698 F.2d 1115, 1118-20 (11th Cir. 1983) (in discussing ancillary jurisdiction, court did not refer at all to *Owen Equipment*'s "logical dependence" test); *Federal Deposit Ins. Corp. v. Otero*, 598 F.2d 627, 633 (1st Cir. 1979) (court states: "We doubt that this tangential relationship would support the pendent jurisdiction enumerated in [*Owen*]," and "there is serious doubt" that rule 18 can be used "to join a claim against the third party which is not related to plaintiff's claim," but did not reach issue of which degree of relatedness would be sufficient).

Appendix at 16-17, 19-20.

Other extracts from the Tenth Circuit opinion reveal the breadth of the confusion among the various circuits as to the standard to be applied:

> "The law among the circuits concerning the scope of ancillary jurisdiction is in some disagreement . . . (Appendix, p. 8).
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> * * *
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> "The confusion in the courts over *Owen Equipment*" stems in part from "seeds of confusion . . . sown by the Supreme Court itself . . . ." (Appendix, p. 11, footnote 11).
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> * * *
>
> "We do not feel compelled to take on the pendent-ancillary jurisdictional dilemma skirted by the Supreme Court . . . . Other courts have been similarly disinclined." (Appendix, p. 12, footnote 3).

* * *

"[T]he case law of the circuits is mixed" concerning exercise of jurisdiction in third-party diversity cases. (Appendix, p. 28).

* * *

"The Ninth Circuit later approved the result in *Schwab* but faulted the Third Circuit's suggestion . . . . The Fifth Circuit, however, . . . appeared to agree with the disputed suggestion in *Schwab*." (Appendix, pp. 30-31, footnote 10).

* * *

"The Fourth Circuit . . . adopted a stance consistent with that later assumed by the Third Circuit. . . . [A] subsequent Fourth Circuit district court opinion . . . declined to follow" the Fourth Circuit opinion. (Appendix, p. 32; p. 33, footnote 11).

* * *

"The most recent (and novel) attempt by a circuit court to resolve the issue we face today is that of the Ninth Circuit" [in *Twin Falls*]. (Appendix, p. 34).

* * *

"The Ninth Circuit's upholding of ancillary jurisdiction in *Twin Falls* has been questioned by a panel of the Seventh Circuit . . . ." (Appendix, p. 35, footnote 12).

* * *

"While we agree with the results in *Twin Falls* and *Payne*, we find the Ninth Circuit's 'original plaintiff' approach in *Twin Falls* unnecessary and more puzzling than helpful. . . . Indeed, the Ninth Circuit contributed to the confusion in a

> subsequent opinion." [*Danner*] (Appendix, p. 37 and footnote 14).
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> * * *
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> "In our view further obfuscating matters" the Ninth Circuit in *Danner* used two analytical theories. "We are baffled by the [Ninth Circuit] approach and conclude it does not advance the goal of defining the contours of ancillary jurisdiction." (Appendix, pp. 37-38, footnote 14).

Further, the Tenth Circuit opinion relegates to a footnote the most recent published opinion which petitioner could find which deals with ancillary claims by a third party plaintiff against a third party defendant, the same alignment of parties as in the instant case. *Hartford Acc. and Indem. Co. v. Sullivan*, 846 F.2d 377 (7th Cir. 1988). (Appendix, p. 35 footnote 12). The Seventh Circuit in *Hartford* concluded that a federal court had no jurisdiction to entertain a third party suit by a defendant against a non-diverse third party defendant which had been impleaded under Rule 14(a) to answer over for plaintiff's claims against defendant. Examining the factual issues involved in each claim, the court concluded that they were closely related but not identical, "nor logically entwined in the sense that the decision in one suit would necessarily decide the other by operation of collateral estoppel or otherwise." 846 F.2d at 380. The Seventh Circuit's view of ancillary jurisdiction is apparently considerably more restrictive than that of the Tenth Circuit, as revealed by the following language from *Hartford*:

> Ancillary jurisdiction should be narrowly interpreted, in recognition that what is at stake is the sovereign right of the states to confine (so far as possible) to their own courts the litigation of issues of state law in disputes between their

> own citizens. The doctrine should not be used merely to enable state and federal suits to be consolidated in federal court whenever ordinary notions of judicial economy would make that a desirable result, but instead should be reserved for cases where failure to exercise federal jurisdiction would prevent a party from obtaining justice. This is not such a case. Having to bring parallel suits may be a hardship, but it is not an injustice.

846 F.2d at 380-81.

Just as in the instant case, the third party plaintiff had brought the third party defendant into federal court through impleader under Rule 14(a). As noted by the Seventh Circuit, "impleader clearly is voluntary. . . . Impleader was just a convenience." 846 F.2d at 382. Petitioner suggests that the instant case would have been decided differently if it had arisen in the Seventh Circuit than in the Tenth Circuit.

Other third party cases which the Tenth Circuit cites in support of its position either pre-date this Court's opinions in *Owen Equipment* or *Finley v. U.S.*, ___ U.S. ___, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989), or are distinguishable from the teachings of those cases. For example, the Tenth Circuit relies heavily on *Schwab v. Erie Lackawanna R.R. Co.*, 438 F.2d 62 (3rd Cir. 1971). (Appendix, p. 28). In fact, *Schwab* supports petitioner's position because, although decided before *Owen Equipment*, it determined that an ancillary property damage claim by defendant railroad against a third party defendant in a personal injury case was so logically dependent upon the outcome of a fault determination in the principal case as to be equivalent to a compulsory counterclaim. 438 F.2d at 71.

Jenkins v. Weinshienk, 670 F.2d 915 (10th Cir. 1982), a mandamus action cited by the Tenth Circuit opinion at Appendix, p. 31, does not address the instant issue but holds that the ancillary jurisdiction of federal courts does not reach to determining fee disputes between attorney and client in cases other than the one in federal court.

United States v. Major Oil Corp., 583 F.2d 1152 (10th Cir. 1978), addresses interpleader jurisdiction over multiple funds under a totally different federal jurisdictional statute than is at issue in this case.

United States v. Acord, 209 F.2d 709 (10th Cir. 1954), actually held that the third party plaintiff had no cause of action for indemnity from the United States as third party defendant under Oklahoma law, and remanded the case for dismissal of the third party complaint. 209 F.2d at 716. Ancillary jurisdiction was not at issue.

Nishimatsu Constr. Co. v. Houston Nat'l Bank, 515 F.2d 1200 (5th Cir. 1975), actually held that the added third party claim fell outside the pale of ancillary jurisdiction because it lacked the requisite logical relationship either to the main claim or to the bank's impleader claim. The Fifth Circuit found the judgment void for want of subject matter jurisdiction. 515 F.2d at 1205.

Noland v. Graver Tank & Mfg. Co., 301 F.2d 43 (4th Cir. 1962), involved parties among whom there was total diversity and thus an independent jurisdictional basis for all claims.

In *United States v. City of Twin Falls, Idaho*, 806 F.2d 862 (9th Cir. 1986), the primary action between plaintiff

and defendant was for violation of federal water pollution standards premised upon 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1345 (United States as a plaintiff). The third party claims at issue in that case were asserted by an Idaho municipality against a California corporation, so there was diversity of citizenship between the third party plaintiff and the third party defendant. Further, the opinion does not even cite *Owen Equipment*.

The final circuit court opinion cited by the Tenth Circuit in support of its position is *United States ex rel. Payne v. United Pacific Insurance Co.*, 472 F.2d 792 (9th Cir. 1973), another pre-*Owen Equipment* case discussed at Appendix, pp. 36-37. However, that case actually held that, although there was jurisdiction as to a third party indemnification claim arising from the main claim, there was no ancillary jurisdiction with respect to claims arising in other transactions which were not the subject of the primary action between plaintiff and defendant; the court rejected the notion that a court has ancillary jurisdiction of a third party claim because it is ancillary to an already ancillary claim. 472 F.2d at 796. In other words, the *Payne* court accurately anticipated the logical dependency test of *Owen Equipment*.

Petitioner respectfully suggests that support for the position of the Tenth Circuit regarding ancillary jurisdiction over third party claims crumbles on close inspection, leaving only those decisions such as *Hartford Insurance* which oppose the view taken by the Tenth Circuit. *See F.O. Majors v. American National Bank of Huntsville*, 426 F.2d 566, 568 (5th Cir. 1970) (an entirely separate claim, although arising out of the same general facts as the main action, is not within the court's ancillary jurisdiction);

Birmingham Fire Ins. Co. of Pa. v. Winegardner & Hammons, Inc., 714 F.2d 548 (5th Cir. 1983) (defendant's effort to join third party defendant to adjudicate a state law issue between non-diverse parties is a dispute which does not belong in federal court).

These cases and the literally dozens of others cited by the parties in their briefs to the courts below amply demonstrate the conflict among the circuits over the scope of ancillary jurisdiction generally, and particularly in cases involving third party practice. (See Table at Appendix, p. 53).

2. The decision of the Court of Appeals conflicts with applicable decisions of this Court.

Notwithstanding the patent confusion among the circuits as to the scope of ancillary jurisdiction, petitioner further suggests that the decision of the Tenth Circuit in this case conflicts with this Court's ruling in *Owen Equipment*. First, as in *Owen Equipment*, the party who brought the case to federal court is the party attempting to assert independent claims against another non-diverse party. In *Owen Equipment* that party was the plaintiff attempting to assert claims against a non-diverse third party defendant which had been impleaded by the original defendant. 437 U.S. at 368-69. In the instant case, that party was respondent herein, defendant in the original action, who removed the case from the state courts of Kansas to federal court with jurisdiction founded on diversity of citizenship. (Appendix, p. 5). Petitioner suggests that the same admonitions should apply to respondent in this case as applied to plaintiff in *Owen Equipment*: "A plaintiff cannot complain if ancillary jurisdiction does not encompass all

his possible claims in a case such as this one, since it is he who has chosen the federal rather than the state forum and must thus accept its limitations." 437 U.S. at 376.

Further, petitioner suggests that respondent herein must be viewed as a plaintiff with regard to its delay damages claim against petitioner because that claim could have been brought and adjudicated in other courts without regard to the outcome of the instant case. The district court found that these other claims were not logically dependent upon the main action, although they were logically related to it and "this logical relationship was sufficient to trigger the court's statutory jurisdictional authority because it permitted the resolution of 'an entire, logically entwined lawsuit' (437 U.S. at 377) as Congress would have intended." (Appendix, pp. 51-52). Petitioner has suggested to the lower federal courts, and respectfully suggests to this Court, that *Owen Equipment* requires more than a logical relationship when there is no independent jurisdictional basis for the claim:

> But neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same State in a diversity case.

437 U.S. at 377.

Whatever might be the proper application in other cases, this case involves a party who voluntarily chose the federal forum by removal, and then voluntarily impleaded an additional non-diverse party and stated claims against that party which did not depend upon the outcome of the principal case for their resolution.

In the instant case, respondent herein filed counterclaims against plaintiff in the U.S. District Court. Presumably those counterclaims could have been the basis for initiating a suit in federal court against King Fisher as defendant, reversing the roles of the parties. If King Fisher had then filed a third party complaint against Langan, respondent's attempts to thereafter adjudicate its delay damages claim directly against Langan would have been in exactly the same posture as the attempted claims by Mrs. Kroger against Owen Equipment: Plaintiff states claims against a non-diverse third party defendant who had been impleaded by the original defendant. In *Owen Equipment* this Court concluded that the District Court "lacked power to entertain" such a lawsuit. 437 U.S. at 377, n. 21. Petitioner suggests that the same result should apply in the instant case.

Much has been made in the briefs and the lower court opinions in the instant case concerning the relationship between respondent's delay damages claim and other claims in the litigation. In this regard it is instructive to remember that the claims in *Owen Equipment* all arose out of a single fatal accident which resulted in the death of plaintiff's husband from electrocution when the boom of a steel crane next to which he was walking came too close to the power line of the original defendant. When defendant utility company filed a third party complaint against Owen Equipment as operator of the crane, the plaintiff amended her complaint to state a claim directly against the crane company also. 437 U.S. at 365. This Court concluded that plaintiff's claim against the crane company was entirely separate from her claim against the power company, since the crane company's liability to her did

not depend upon whether the power company was also liable. 437 U.S. at 376.

In exactly the same fashion, petitioner's liability to respondent on the delay damages claim in the instant case did not depend upon whether respondent was liable to any other party in the case on any of the other claims. This is clearly demonstrated by the manner in which the District Court awarded judgment to respondent against petitioner. All the other claims in the law suit had been dismissed or settled, and no reference to any such claims was cited by the District Court as a basis for its judgment against petitioner. That judgment was not dependent in any way on the outcome of the other claims. "Far from being an ancillary and dependent claim, it was a new and independent one." 437 U.S. at 376.

The Tenth Circuit concluded that respondent's state claims may have been time barred if the District Court had dismissed them following settlement of the principal claims. (Appendix, pp. 43-44). However, this overlooks Kansas procedural statutes which allow a plaintiff six months after termination of an action "otherwise than upon the merits" to commence a new action. Kan.Stat. Ann. § 60-518. The Kansas Supreme Court has specifically construed this statute to include a dismissal of an action for want of jurisdiction where the prior judgment was held to be void. *Rifner v. Lindholm,* 132 Kan. 434, 295 P.2d 670 (1931). The availability of this continuing remedy to respondent herein is important in the context of the language in *Owen Equipment* that "Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights . . . ." 437 U.S. at 377.

Petitioner has never disputed the jurisdiction of the federal court to determine the Rule 14(a) pass-through claims of respondent against it. In this respect it is like the third party defendant in *Owen Equipment* in that it was validly brought into the law suit for a determination of that claim. It is the independent claim herein, like the independent claim of plaintiff in *Owen Equipment* against one who was already properly a party to the action on the dependent, ancillary claim, that gives rise to this challenge to federal court jurisdiction.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests the Court to issue a Writ of Certiorari to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

RICHARD F. HAYSE
HAYSE LAW OFFICES
914 Merchants National
Bank Bldg.
Topeka, Kansas 66612-1216
(913)232-2662

Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KING FISHER MARINE SERVICE INC., a Texas corporation, Plaintiff, v. 21ST PHOENIX CORPORATION, formerly known as The Hanson Development Company, a Delaware corporation, Defendant-third-party-plaintiff – Appellee, v. LANGAN ENGINEERING ASSOCIATES, INC., a corporation, Third-party-defendant – Appellant, HIGHLANDS INSURANCE COMPANY, a Texas corporation, Third-party-defendant.	No. 87-2478 (D.C. No. T-5258) (Filed Febr. 5, 1990)

JUDGMENT
Entered January 10, 1990

Before LOGAN and BRORBY, Circuit Judges, and ALLEY, District Judge.*

*The Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, sitting by designation.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by by [sic] counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court

ROBERT L. HOECKER, Clerk
By /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

KING FISHER MARINE SERVICE, INC., a Texas corporation,	)	
Plaintiff,	)	
v.	)	No. 87-2478
21ST PHOENIX CORPORATION, f/k/a The Hanson Development Company, a Delaware corporation,	)	(Filed Jan. 10, 1990)
Defendant-Third-Party-Plaintiff-Appellee,	)	
v.	)	
LANGAN ENGINEERING ASSOCIATES, INC., a corporation	)	
Third-Party-Defendant-Appellant,	)	
HIGHLANDS INSURANCE COMPANY, a Texas corporation	)	
Third-party-Defendant.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. NO. T-5258)

Kevin M. Fowler (John C. Frieden with him on the brief) of Frieden & Forbes, Topeka, Kansas, for Defendant-Third-Party-Plaintiff-Appellee.

Richard F. Hayse (Anne L. Baker with him on the brief) of Edison, Lewis, Porter & Haynes, Topeka, Kansas, for Third-Party-Defendant-Appellant.

Before **LOGAN** and **BRORBY**, Circuit Judges, and **ALLEY**,* District Judge.

BRORBY, Circuit Judge.

Appellant Langan Engineering Associates (Langan), third-party defendant below, seeks to set aside a 1979 judgment of the federal district court of Kansas on the ground that the judgment is void for lack of subject matter jurisdiction. The district court (Rogers, J.) denied Langan's motion for relief under Fed. R. Civ. P. 60(b)(4), holding it had ancillary jurisdiction of third-party plaintiff Hanson Development Co.'s (Hanson's) claims against Langan and did not abuse its discretion in exercising that jurisdiction. *King Fisher Marine Serv., Inc. v. Hanson Dev. Co.*, 717 F. Supp. 727 (D. Kan. 1987). Langan's appeal squarely raises, apparently for the first time before this court, the question whether a defendant may join with its proper third-party indemnity claim other claims it may have against the third-party defendant. We hold that under the circumstances of this case it may, and we affirm.

I. STATEMENT OF THE CASE AND FACTS

This case involves contract claims concerning the construction of a shopping center in Wichita, Kansas. The

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*The Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, sitting by designation.

facts are set forth at 717 F. Supp. at 728. The original suit was filed in state court in 1972 by King Fisher Marine Service (King Fisher), a Texas corporation, against Hanson Development Company (Hanson is now known as the 21st Phoenix Corporation), a Delaware corporation with its principal place of business in New Jersey. King Fisher sought, *inter alia*, money allegedly due it under its contract with Hanson for the performance of site fill work and additional damages for construction delays.

Hanson removed the action to federal court on the grounds of diversity and subsequently filed an amended answer, a counterclaim for delay damages against King Fisher, and a third-party complaint against Langan Engineering Associates (Langan), whom Hanson had hired to conduct site evaluation and contract supervision. Langan's principal place of business was also New Jersey; thus there was no diversity between the third-party litigants. Hanson's third-party complaint asserted pass-through claims against Langan under Fed. R. Civ. P. 14(a). It also asserted a claim for damages in excess of the pass-through claims, which it asserted were due to Langan's delays if not to King Fisher's delays as alleged in its counterclaim against King Fisher. The contract claims between King Fisher and Hanson were settled immediately prior to trial. Trial proceeded on Hanson's third-party claim, but Langan did not appear. The court considered evidence and argument by Hanson and awarded Hanson a judgment of more than $155,000.00 on its delay damages claim against Langan.

Langan did not appeal. Instead, on October 3, 1983, it filed a 60(b)(4) motion to set aside the judgment on the ground that it had no notice of the trial date or the entry

of judgment. The federal district court denied the motion, and we affirmed. *King Fisher Marine Serv., Inc. v. 21st Phoenix Corp.*, No. 84-1025 (10th Cir. Sept. 11, 1985). Approximately one year later Langan filed the instant rule 60(b)(4) motion to vacate the judgment, asserting the lack of diversity between it and Hanson and the absence of ancillary jurisdiction of the delay damages claim under the Supreme Court's analysis in *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978). The question of the district court's subject matter jurisdiction of the delay damages claim had not been litigated previously by the parties nor considered by the court. The district court held it had constitutional and statutory authority to exercise jurisdiction of Hanson's third-party claims against Langan and denied Langan's motion. 717 F. Supp. at 730. Langan has appealed.

II. ANALYSIS

The parties' arguments can be distilled as follows: Appellant Langan argues that, because there was no diversity between Langan and Hanson and no federal question (the delay damages claim was based on state law), ancillary jurisdiction was required over the delay damages claim. However, that claim was not "logically dependent upon" the original plaintiff's claim against defendant Hanson; therefore, under *Owen Equipment*, 437 U.S. at 376, the district court lacked jurisdiction to hear the claim. Langan further contends its 60(b)(4) motion is a direct attack on a judgment that lacked jurisdiction and is therefore void; thus, the judgment can be vacated under 60(b)(4).

Hanson, on the other hand, argues that its delay damages claim against Langan is logically related to, or logically entwined with, King Fisher's claim against Hanson, over which the court did have jurisdiction on the basis of diversity. Because a court has jurisdiction to determine the entire case or controversy before it, the district court had ancillary jurisdiction over the delay damages claim. As to the 60(b)(4) motion, Hanson argues that Langan's challenge of the judgment is barred by res judicata or, alternatively, that an erroneous determination and exercise of statutory jurisdiction do not render a judgment "void" for purposes of a 60(b)(4) attack. In other words, Hanson contends the district court properly exercised jurisdiction, but even if it did not, rule 60(b)(4) is not available to challenge the judgment.

A. Standard of Review

In reviewing the district court's determination that its judgment is not void for lack of subject matter jurisdiction, this court reviews *de novo*. *Jones v. Giles*, 741 F.2d 245, 247 (9th Cir. 1984); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 223-24 nn.7-8 (10th Cir. 1979). While the district court suggested that the standard might be abuse of discretion, 717 F.2d at 729, relief is not discretionary if a judgment is void. *See V.T.A., Inc.* at 223-24 nn.7-8; 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2862, at 197 (1973). The trial court is correct, however, that once it has been determined that jurisdiction exists we review a court's decision whether to exercise jurisdiction under an abuse of discretion standard, *United States v. City of Twin Falls*, 806 F.2d 862, 868 (9th Cir. 1986), cert. denied, 482 U.S. 914 (1987); *Dahlberg v. Becker*, 581 F. Supp. 855, 865 (N.D.N.Y.),

aff'd, 748 F.2d 85 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). *See* C. Wright & A. Miller, § 1444, at 234-37 (1971), 97-98 nn.1-2 (1989 Supp.).

B. Subject Matter Jurisdiction

The law among the circuits concerning the scope of ancillary jurisdiction is in some disagreement, and there is no Tenth Circuit case on all fours with the case at bar. It is well settled, however, that a court has ancillary jurisdiction of a defendant's proper rule 14(a) claim[1] against a third-party defendant without regard to whether there is an independent basis of jurisdiction (e.g., diversity between the third-party litigants), so long as the court has jurisdiction of the main claim between the original parties. *Dery v. Wyer*, 265 F.2d 804 (2d Cir. 1959); 6 C. Wright

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[1] Fed. R. Civ. P. 14(a) provides in relevant part:

> (a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to [him] for all or part of the plaintiff's claim against the third-party plaintiff.*

(Emphasis added.) Rule 14's provision for impleading parties is narrow: the third-party claim must be derivative of the original claim. *See* C. Wright & A. Miller, § 1441, at 199, 206. Here, Hanson's pass-through claim against Langan was a proper rule 14(a) claim. It sought indemnification for any liability for damages found in favor of King Fisher against Hanson. This claim was not decided by the district court because King Fisher's claims against Hanson were settled prior to trial.

& A. Miller, *Federal Practice and Procedure* § 1444, at 223-25 (1971 & 1989 Supp.) (cases cited in notes 68-69). *See Moor v. County of Alameda*, 411 U.S. 693, 715 (1973). Here, the district court had jurisdiction of King Fisher's claims against Hanson based on diversity of citizenship. Langan does not contest that the court consequently had jurisdiction over Hanson's pass-through, third-party claim against it. It disputes only the court's authority to decide Hanson's additional claim for delay damages.

Both parties agree there is no independent basis of jurisdiction over Hanson's delay damages claim against Langan. Both Hanson and Langan are residents of New Jersey, and the claim was based on state law. Thus, the court could properly decide the claim only if it falls within its ancillary jurisdiction.[2]

1. Owen Equipment

The Appellant relies heavily on *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978), which it asserts holds that "a common nucleus of operative fact" is not

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[2] Under Fed. R. Civ. P. 18(a) a party asserting a claim (original claim, counterclaim, cross-claim, or third-party claim) may join as many claims as it has against an opposing party. However, the federal rules do not confer jurisdiction on the federal courts, Fed. R. Civ. P. 82; hence, a court may decide claims joined under rule 18(a) only if independent jurisdiction and venue requirements are satisfied. See *infra* section B.2. of the text for a discussion of how certain courts have dealt with rule 18(a) in deciding questions of ancillary jurisdiction.

the only requirement for ancillary jurisdiction in a diversity case; in addition, there must be a "logical dependence" between the primary and third-party claims. Brief of Appellant at 13, 17 (citing 437 U.S. at 376). We believe the Appellant overstates *Owen Equipment's* holding. It overlooks, as have certain courts that have relied on *Owen Equipment* to resolve questions of jurisdiction, the Court's own caveat that, "in determining whether jurisdiction over a nonfederal claim exists, the *context* in which the nonfederal claim is asserted is *crucial*." 437 U.S. at 375-76 (emphasis added). It also accords undue significance to the Court's use of the term "logical dependence" to characterize an ancillary claim. In order to explain these conclusions, we begin with a discussion of *Owen Equipment* and its predecessors.

Mrs. Kroger, the plaintiff in *Owen Equipment* and an Iowa resident, brought a wrongful death action in federal court against the Omaha Public Power District (OPPD), a Nebraska corporation, whom she alleged caused the electrocution death of her husband by its negligent construction and maintenance of a power line. OPPD then filed a third-party complaint against Owen Equipment, an Iowa corporation and owner of the crane Kroger had been operating at the time of his death, alleging that its negligence had caused Kroger's death. Subsequently, Mrs. Kroger amended her complaint, naming Owen Equipment as an additional defendant.

The Court held that there was no jurisdiction to hear Mrs. Kroger's claim against Owen Equipment. Permitting her to amend her complaint in this way would have defeated the requirement of complete diversity between plaintiffs and defendants, thus allowing her to do what

she could not have done initially – bring suit against both Owen and OPPD in federal court. The Court distinguished *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), on which the court of appeals had erroneously relied in upholding the district court's exercise of jurisdiction. *Gibbs*, the Court explained, involved "pendent jurisdiction, which concerns the resolution of a plaintiff's federal- and state-law claims against a single defendant in a single action." 437 U.S. at 370. *Owen Equipment*, on the other hand, involved "state-law tort claims against two different defendants," apparently raising the issue of the existence of ancillary jurisdiction. *Id.*[3] Nevertheless,

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[3] The confusion in the courts over *Owen Equipment* stems in part from subsequent applications of its holding by the lower courts to sets of facts it was not crafted to fit. The first seeds of confusion, however, were sown by the Supreme Court itself, when it expressed doubt about the precise jurisdictional doctrine at issue in *Owen Equipment* and in its predecessor, *Aldinger v. Howard*, 427 U.S. 1 (1975). Somewhat cryptically the *Owen Equipment* Court observed: "No more than in [*Aldinger*] is it necessary to determine here 'whether there are any "principled" differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences.' " 437 U.S. at 370 n.8 (quoting 427 U.S. at 13).

Yet in apparent contradiction of its "principled differences" comment, the *Owen Equipment* Court itself distinguished between pendent and ancillary jurisdiction in noting the court of appeals' misplaced "reli[ance] upon the doctrine of ancillary jurisdiction, whose contours it believed were defined . . . in [Gibbs]," when in fact "*Gibbs* . . . involved pendent jurisdiction, which concerns the resolution of a plaintiff's federal- and state-law claims against a single defendant in one action." 437 U. S. at 370.

(Continued on following page)

the Court concluded that the two cases presented "two species of the same generic problem: Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same State?" *Id.*

The Court found that the court of appeals had misapprehended the scope of the *Gibbs* doctrine. *Gibbs* held:

(Continued from previous page)

The confusion persists in the Court's most recent reappraisal of Owen Equipment:

> We reaffirmed and further refined our approach to *pendent-party jurisdiction* in *Owen Equipment*. . . . We held that the jurisdiction which § 1332(a)(1) confers over a "matter in controversy" between a plaintiff and defendant of diverse citizenship cannot be read to confer *pendent jurisdiction* over a different, nondiverse defendant, even if the *claim* involving that other defendant meets the *Gibbs* test.

Finley v. United States, 109 S. Ct. 2003, 2007 (1989) (emphasis added). (The *Gibbs* test to which the Court referred is the familiar "common nucleus of operative fact" test used to define the contours of a "case" and, hence, a federal court's power to hear all claims presented to it.)

We do not feel compelled to take on the pendent-ancillary jurisdictional dilemma skirted by the Supreme Court in *Aldinger* and *Owen Equipment* and apparently not since revisited by it. Other courts have been similarly disinclined. *E.g. Danner v. Himmelfarb*, 858 F.2d 515, 523 (9th Cir. 1988), ("[w]e do not find it necessary in this case to decide 'whether there are any "principled" differences between pendent and ancillary jurisdiction' "), *cert. denied*, 109 S. Ct. 2067 (1989). Nevertheless, we must attempt to determine what guidelines the Court has established in the *Gibbs-Aldinger-Owen Equipment* line of cases with respect to our power to decide the case at bar.

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution [and] Laws of the United States . . . " and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." . . . The state and federal claims must derive from a common nucleus of operative fact. But if . . . a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

383 U.S. at 725, *quoted in Owen Equipment*, 437 U.S. at 371 (emphasis in original, citations omitted).

According to the *Owen Equipment* Court, "*Gibbs* delineated the constitutional limits of federal judicial power." 437 U.S. at 371. But *Owen Equipment* made it clear that determining a court's constitutional power to decide a case (the object of the *Gibbs* "common nucleus of operative fact" test) is "merely the first hurdle" in deciding whether jurisdiction exists. 437 U.S. at 372. *Owen Equipment* further established that

> there must be an examination of the posture [or context] in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim, in order to determine whether "Congress in [that statute] has . . . expressly or by implication negated" the exercise of jurisdiction over the particular nonfederal claim.

437 U.S. at 373 (quoting *Aldinger v. Howard*, 427 U.S. at 18); *see also* 437 U.S. at 376. Thus, the Constitution confers on federal courts the power to decide all claims deriving

from a common nucleus of operative fact, but Congress may restrict the exercise of that power in certain circumstances.

Here, there is no dispute that Hanson's delay damages claim against Langan arises out of the same nucleus of operative facts as do King Fisher's claims against Hanson, that is, completion of the fill work for the Wichita shopping center project. The district court thus held and we agree that the court possessed the *constitutional* power to hear the additional delay damages claim. 717 F. Supp. at 730; Brief of Appellant at 15. Langan does not deny that constitutional power existed, but it claims that the secondary jurisdictional tests set forth in *Owen Equipment* – the "posture of the case and the statutory grant of jurisdiction" (here, the diversity statute, 28 U.S.C. § 1332) – preclude jurisdiction over the delay damages claim. Brief of Appellant at 15-16, 28-29 (citing 437 U.S. at 373).

The "posture" in which the nonfederal claim in *Owen Equipment* was raised was that of an added state law claim by the original plaintiff in a diversity case against a second, nondiverse defendant. The Court held that, because the plaintiff had voluntarily chosen the federal forum, she could not complain if the limited jurisdiction of the federal courts precluded her from bringing a separate, state-law claim. A state court could have heard all of her claims. 437 U.S. at 376. The Court contrasted this situation with that of a typical ancillary claim, specifically the impleader by a defendant of a third-party defendant: "[A]ncillary jurisdiction typically involves claims by a defending party haled into court against his will. . . ." *Id.*

Here we are presented with the latter situation – a defending party, Hanson, "haled into court" involuntarily. True, Hanson could have brought all its claims in state court, and it did "choose" the federal forum by exercising its right as a defendant to remove King Fisher's original state action. But we do not believe these facts place this case on a par with *Owen Equipment*, such that it requires dismissal of Hanson's delay damages claim. For one thing, we agree with the district court that its exercise of jurisdiction over all Hanson's claims against Langan promoted Hanson's statutory removal rights "by not forcing Hanson to choose between defending against [King Fisher's] claims in state court and bringing closely related claims against Langan." 717 F. Supp. at 729. A defendant is not first required to demonstrate that its case would be prejudiced in state court, as the Appellant appears to suggest. *See* Brief of Appellant at 24-25. Furthermore, this case does not pose the danger with which the *Owen* court was concerned – the potential for a plaintiff to defeat the requirement of complete diversity by suing only diverse defendants and waiting for them to implead nondiverse defendants. 437 U.S. at 374 & n.17; *see also* 717 F. Supp. at 730.

The Court recently observed in *Finley v. United States*, 109 S. Ct. 2003, 2007-08 (1989), that the "most significant element of 'posture' or of 'context' in [this] case . . . is precisely that the added claims involve added parties over whom no independent basis of jurisdiction exists." (Citations omitted.) The same concern was at the heart of *Owen Equipment*, but it is not implicated here. Here, Langan was not "added" as a party by the assertion of the delay damages claim, but by impleader under rule 14(a).

As previously noted, a court has ancillary jurisdiction of a defendant's proper rule 14(a) claim against a third-party defendant without regard to whether there is an independent basis of jurisdiction, so long as the court has jurisdiction of the main claim between the original parties. 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1444, at 223-25 (1971 & 1989 Supp.) (cases cited in notes 68-69). In fact, the Court in *Owen Equipment* noted that "the exercise of ancillary jurisdiction . . . has often been upheld in situations involving impleader." 437 U.S. at 375. The precise issue here is, not whether Langan was properly added as a party, but whether, once properly joined as a party, the delay damages claim was properly asserted against it.

Owen Equipment explained why a claim impleading a third party has been considered ancillary: "A third-party complaint depends at least in part upon the resolution of the primary lawsuit. Its relation to the original complaint is thus not mere factual similarity but logical dependence." 437 U.S. at 376 (citation omitted). The Court contrasted such a claim with the attempted state law claim against the nondiverse defendant in *Owen*. The latter, the Court found, "was entirely separate from [the plaintiff's] original claim against the [diverse defendant], since the [nondiverse defendant's] liability to her depended not at all upon whether or not [the diverse defendant] was also liable. Far from being an ancillary and dependent claim, it was a new and independent one." 437 U.S. at 376.

Appellant has interpreted the foregoing language as *requiring* "logical dependence" in order to find ancillary jurisdiction of a claim sought to be added. A number of

courts are in apparent agreement with that assessment. *See, e.g., National Union Fire Ins. Co. of Pittsburgh, Pa. v. Continental Ill. Corp.*, 661 F. Supp. 964, 969 (N.D. Ill. 1987); *May's Family Centers, Inc. v. Goodman's, Inc.*, 104 F.R.D. 112, 115 (N.D. Ill. 1985); *Dahlberg v. Becker*, 581 F. Supp. 855, 865 (N.D.N.Y.) *aff'd*, 748 F.2d 85 (2d Cir. 1984) *cert. denied*, 470 U.S. 1084 (1985). *Cf. Gus T. Handge & Son Painting Co. v. Douglass State Bank*, 543 F. Supp. 374, 379-80 (D. Kan. 1982). It should be recognized, however, that the Court in *Owen Equipment* was not stating a *prerequisite* of ancillary jurisdiction, but a common *feature* of third-party indemnity claims (i.e., that the third-party defendant's liability to the third-party plaintiff "depends at least in part" on whether the third-party plaintiff is first found liable to the plaintiff in the original action). 437 U.S. at 376. The *Owen Equipment* Court's reference to *Moore v. New York Cotton Exch.*, 270 U.S. 593, 610 (1925), is instructive in this regard.

In support of its "logical dependence" characterization, the Court cited the test established in *Moore* for determining a "transaction" in the context of a compulsory counterclaim.[4] " 'Transaction,' " the *Moore* Court held, "is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their *logical relationship.*" 270 U.S. at 610 (emphasis added). *Moore* involved a suit by the Odd-Lot Cotton Exchange (by its president Moore) seeking, *inter alia*, a decree that the

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[4] A compulsory counterclaim is one " 'arising out of the transaction which is the subject matter of the suit,' [and which] must be pleaded," the Court explained. 270 U.S. at 609 (quoting equity rule 30).

New York Cotton Exchange was a monopoly and enjoining it from refusing to supply members of the Odd-Lot Exchange with price quotations. The New York Exchange counterclaimed for an injunction against the Odd-Lot's practice of "purloining" the price quotations. The *Moore* Court found that the New York Exchange's refusal to supply price quotations to the plaintiff was

> one of the links in the chain which constitutes the transaction upon which appellant here bases its cause of action. It is an important part of the transaction constituting the subject-matter of the counterclaim. It is one circumstance without which neither party would have found it necessary to seek relief. . . . That [the facts alleged by the parties] are not precisely identical, or that the counterclaim embraces additional allegations . . . does not matter. . . .
>
> So close is the connection between the case sought to be stated in the [complaint] and that set up in the counterclaim, that it only needs the failure of the former to establish the foundation for the latter; but the relief afforded by the dismissal of the [complaint] is not complete without [providing the relief sought by the counterclaim].

Id.

Moore thus sheds light on the *Owen Equipment* Court's statement concerning the frequent, proper exercise of ancillary jurisdiction in cases involving impleader, counterclaims, and cross-claims. 437 U.S. at 375. Considered in this context, "logical dependence" takes on significance, not as an absolute requirement, but as evidence of the interrelatedness of the claims as components of the same transaction or series of transaction. Analogizing the

case at bar to the second paragraph quoted from *Moore* above, if Hanson was liable to King Fisher for damages resulting from the delay in completing the fill, but the delay was caused by Langan and also resulted in damages to Hanson, then relief to Hanson would not be complete without providing it the relief sought in its additional delay damages claim.

That *Owen Equipment* did not intend to establish a rigid test for the exercise of ancillary jurisdiction is best evidenced by the Court's own concluding statement:

> It is not unreasonable to assume that, in generally requiring diversity, Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or *effectively to resolve an entire, logically entwined lawsuit*. Those practical needs are the basis of the doctrine of ancillary jurisdiction.

437 U.S. at 377 (emphasis added). The district court in the case at bar was persuaded by this reasoning. It acknowledged that "other claims [presumably the delay damages claim] were made which were not logically dependent on the main action, although they were logically related." 717 F. Supp. at 730. But the court believed that a logical relationship, without "dependence," is sufficient to confer subject matter jurisdiction because it permits "the resolution of 'an entire, logically entwined lawsuit.' " *Id.* Other courts have reached similar conclusions. *E.g., Travelers Ins. Co. v. First Nat'l Bank of Shreveport*, 675 F.2d 633, 638 (5th Cir. 1982) ("key is . . . 'logical relationship' "); *Cumberland Village Hous. Assocs. v. Inhabitants of Cumberland*, 609 F. Supp. 1481, 1486 (D. Me. 1985) (sufficient that claims, although "not necessarily logically dependent,"

were "tightly intertwined"). *Cf. United States v. City of Twin Falls, Id.*, 806 F.2d 862, 867-68 (9th Cir. 1986) *cert. denied*, 482 U.S. 914 (1987) ("[T]here is a close factual and logical nexus between the pendent claims added under Rule 18(a) and the original claim. Therefore, pendent jurisdiction supports these claims.");[5] *Lykins v. Pointer Inc.*, 725 F.2d 645, 648 n.2 (11th Cir. 1984) (lack of logical dependence between claims did not defeat ancillary jurisdiction because statute held not to preclude procedural posture of claim); *Eagerton v. Valuations, Inc.*, 698 F.2d 1115, 1118-20 (11th Cir. 1983) (in discussing ancillary jurisdiction, court did not refer at all to *Owen Equipment's* "logical dependence" test); *Federal Deposit Ins. Corp. v. Otero*, 598 F.2d 627, 633 (1st Cir. 1979) (court stated: "We doubt that this tangential relationship would support the pendent jurisdiction enumerated in [*Owen*]," and "there is serious doubt" that rule 18 can be used "to join a claim against the third party which is not related to plaintiff's claim," but did not reach issue of what degree of relatedness would be sufficient).

We agree with the district court and the foregoing cases. We decline to find, as Appellant Langan apparently suggests, that "logical dependence" as used in *Owen Equipment* requires something more or different than the logical connection between claims comprising "an entire, logically entwined lawsuit."

But even if a logical relationship without dependence is sufficient, the Appellant further denies there is any logical connection between Hanson's delay damages

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[5] See discussion of *United States v. Twin Falls* below.

claim against Langan and any claim asserted by King Fisher. Brief of Appellant at 21-23. The district court found, however, that the additional claim asserted by Hanson "come[s] from a nucleus of facts common to the other claims in the lawsuit" and is "logically related to the main action." 717 F. Supp. at 729, 730. We must accept the district court's appraisal of the facts unless clearly erroneous. *Equal Employment Opportunity Comm'n v. General Lines, Inc.*, 865 F.2d 1555, 1558 (10th Cir. 1989). Both King Fisher and Hanson asserted claims for delay damages. Because Langan was designated Hanson's representative under the construction contract and all work by King Fisher was subject to the approval of Langan, arguably any delays by Langan would give rise to damages to both Hanson and King Fisher. *See* Brief of Appellant at 2. So viewed, Hanson's claim against Langan for damages due to delay would clearly seem to be, as the district court found, logically related to King Fisher's claim. It could not reasonably be characterized as "independent" or "entirely separate." *Owen Equipment*, 437 U.S. at 376.[6] The Appellant's argument to this effect is without merit.

We have determined the district court had the constitutional power to hear Hanson's delay damages claim and that the "posture" of the claim did not preclude jurisdiction. We next undertake the final consideration mandated by *Aldinger* and *Owen Equipment* – whether Congress has " 'expressly or by implication negated' the

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[6] Appellee suggests that jurisdiction can be supported on the basis of 28 U.S.C. § 1441(c), which applies to the removal to federal court of cases that involve separate and independent claims. Section 1441(c), however, is inapplicable to this action.

exercise of jurisdiction over the particular nonfederal claim." 437 U.S. at 373 (quoting 427 U.S. at 18). We begin with a brief look at three cases in which the Court has found evidence of such congressional intent.

In both *Owen Equipment* and *Aldinger* the Court determined that Congress by statute had foreclosed the exercise of federal jurisdiction. In *Owen Equipment* the Court held that the diversity statute, 28 U.S.C. § 1332(a)(1), precluded the extension of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same state. 437 U.S. at 377. *Aldinger* involved federal civil rights claims under 28 U.S.C. §§ 1343(3) and 1983, and state claims under Washington law by a discharged county employee against the county, certain county officers, and the county commissioners. The Court held that, in light of the exception of counties from persons subject to suit under § 1983 and, by reference, under § 1343, 427 U.S. at 16-17, the jurisdiction of the federal courts did not extend to joinder of counties for purposes of asserting state law claims not within the court's diversity jurisdiction. The Court concluded that "Congress has by implication declined to extend federal jurisdiction over a party such as Spokane County." *Id.* at 19. More recently, in *Finley v. United States*, 109 S. Ct. 2003, 2008 (1989), the Court held that the Federal Tort Claims Act, 28 U.S.C. § 1346(b), which confers jurisdiction over "civil actions on claims against the United States," precludes federal jurisdiction of related claims against defendants other than the United States without an independent basis of jurisdiction.[7]

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[7] In support of this conclusion, the Court also noted that the relation between the petitioner's added claims and the

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The relevant statute in this case, as in *Owen Equipment*, is the diversity statute. We note at the outset, however, that the Court's conclusion in *Owen Equipment* concerning the exercise of jurisdiction in those circumstances does not dictate our conclusion here. In our view, Congress has neither impliedly nor expressly negated the exercise of jurisdiction over Hanson's added third-party claim. First, the fact-specific approach established by the Court in *Aldinger* and subsequently followed in *Owen Equipment* defeats any argument that *Owen Equipment* compels a particular outcome in this case. Indeed, after holding that federal (pendent or ancillary) jurisdiction did not encompass the claims against the county in *Aldinger*, the Court cautioned that "[o]ther statutory grants *and other alignments of parties and claims* might call for a different result." 427 U.S. at 18 (emphasis added); *cf. Federal Deposit Ins. Corp. v. Otero*, 598 F.2d 627, 632 (1st Cir. 1979) (and cases cited therein).[8] The Court considered

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original complaint was one of "mere factual similarity." 109 S. Ct. at 2008 (citing *Owen Equipment*, 437 U.S. at 376).

[8] The *Aldinger* Court found it "quite unnecessary to formulate any general, all-encompassing jurisdictional rule," 427 U.S. at 13, noting that "the question of pendent-party jurisdiction is 'subtle and complex,' " and that "it would be as unwise as it would be unnecessary to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction." *Id.* at 18. With respect to its decision not to formulate an all-inclusive rule, the Court offered the following comment:

> Given the complexities of the many manifestations of federal jurisdiction, together with the countless

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it a "better approach . . . to determine what *Gibbs* [the authority relied on by the appellant] did and did not decide, and to identify what we deem are important differences between the jurisdiction sustained in *Gibbs* and that asserted here." *Id.* at 13. Similarly, we must determine the important differences between the jurisdiction asserted in *Owen Equipment* and that asserted here and heretofore unaddressed by this circuit.

Second, in determining whether the "complete diversity" required by the statute, *see* 437 U.S. at 373 n.13 and cases cited therein, precludes a federal court from hearing Hanson's delay damages claim, we must keep in mind the *Owen Equipment* Court's prudent observation that, *"in generally requiring complete diversity,* Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or

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> factual permutations possible under the Federal Rules, there is little profit in attempting to decide, for example, whether there are any "principled" differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences.

427 U.S. at 13; *see also* 437 U.S. at 370 n.8.

The Court adhered to this case-specific approach in *Owen Equipment,* placing heavy emphasis on the particular context in which the nonfederal claim there was raised. 437 U.S. at 375-76 (citing 427 U.S. at 14). The Court decided only that a plaintiff in the circumstances of the petitioner could not assert against a nondiverse defendant in federal court a state-law claim that was "entirely separate" from her primary claim against the original defendant (over which the court had jurisdiction on the basis of diversity). 437 U.S. at 376.

effectively to resolve an entire, logically entwined lawsuit." 437 U.S. at 377 (emphasis added).

Considered in light of *Finley*, the statutory (or congressional intent) analysis and the "posture" considerations mandated by *Aldinger* and *Owen Equipment* tend to overlap in the circumstances of this case.[9] As we have already explained, impleader of a nondiverse third-party defendant is a commonly accepted practice, generally conceded to come within the compass of a federal court's ancillary jurisdiction. We question how the purposes of requiring diversity of citizenship can be thwarted, once an "exception" has been made to allow the impleader of a nondiverse defendant, by allowing an additional, related claim against that party. In other words, if the diversity statute has not "expressly or by implication negated the exercise of jurisdiction" over the rule 14(a) claim, how can it be said to have done so with respect to additional, related claims? This is not to say that once in federal court a defendant should be subject to *any* claim another party may have against him. Proper application of the *Gibbs* "common nucleus of operative fact" test will prevent that abuse. But we search the Supreme Court's opinion in *Owen Equipment* in vain for a rationale for extending ancillary jurisdiction to the pass-through claim and not to other, logically related claims.

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[9] As discussed above, *Finley*, 109 S. Ct. at 2007-08, held that the "most significant element of 'posture' or of 'context' in the present case . . . is precisely that the added claims involve added parties over whom no independent basis of jurisdiction exists" (citations omitted). As already explained, that is not our case here. Langan was in federal court by virtue of the court's proper exercise of its ancillary jurisdiction of Hanson's rule 14(a) claim.

We find *Aldinger* in accord with this view. The Court was considering whether a county could be joined in a 28 U.S.C. § 1983 action for the purposes of asserting related state law claims against it, when the county could not be sued directly under the federal statute and there was no other basis of federal jurisdiction (e.g., diversity). It found that "[t]wo observations suffice for the disposition of the type of case before us." 427 U.S. at 18. In addition to the significance of congressional intent, the Court noted: "If the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim." *Id.* The case before us fits the latter category; Langan was "already before the court," properly impleaded under the court's ancillary jurisdiction and rule 14(a).

Following the Court's lead in *Aldinger* and *Owen Equipment*, we have identified "what we deem are important differences," 427 U.S. at 13, between those cases and this one – the posture in which the nonfederal claim was raised here (by a defendant and third-party plaintiff), and the fact that the defending party (Langan) was already before the court, properly impleaded under rule 14(a). These differences suggest that the exercise of jurisdiction in this case was proper.

We acknowledge that "neither the convenience of litigants nor considerations of judicial economy" are alone sufficient "to justify extension of the doctrine of ancillary jurisdiction" to a plaintiff's state-law cause of action against a nondiverse defendant. *Owen Equipment*, 437 U.S. at 377. But in this case, these and other relevant

prudential considerations only bolster our conclusion. "Both as a matter of policy and of logic," *Schwab v. Erie Lackawanna R.R. Co.*, 438 F.2d 62, 68 (3d Cir. 1971), Hanson should be allowed to assert its additional claim against Langan. As the district court held, judicial economy and convenience were served by considering all the claims together, and the Appellant has asserted no prejudice or unfairness in the court's exercise of jurisdiction. Moreover, as stated earlier, exercising jurisdiction promoted Hanson's statutory removal rights. 717 F. Supp at 729.

2. Third-Party Claim Case Law

Having examined our facts in light of the holdings of *Aldinger* and *Owen Equipment*, we next turn to the case law and commentators to ascertain how other courts have resolved jurisdictional issues like the one presented here. The standard treatises accord with our conclusion that the district court's exercise of jurisdiction was proper. Wright and Miller assert that, "[i]f the additional claim arises out of the same transaction or occurrence as the claim for liability over [i.e., the pass-through claim], the additional claim should be treated as ancillary for purposes of subject matter jurisdiction and venue." 6 *Federal Practice and Procedure* § 1452, at 118 (1989 Supp.). Similarly, Professor Moore writes: "The concept of ancillary jurisdiction also properly justifies taking jurisdiction over an additionally joined claim of the third-party plaintiff against the third-party defendant, provided the additionally joined claim is sufficiently related to the original claim to be deemed ancillary." 3 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 14.26, at 14-112 (1989).

Although the case law of the circuits is mixed, we believe the better reasoned decisions also support the result we reach today. We briefly review these cases, limiting our survey (in light of the Supreme Court's emphasis on the context in which a nonfederal claim is raised) to diversity cases involving third-party claims.

The case most often cited for the proposition that exercise of jurisdiction in these circumstances is authorized is *Schwab v. Erie Lackawanna R.R. Co.*, 438 F.2d 62 (3d Cir. 1971). In *Schwab* (a pre-*Owen Equipment* case), a railroad employee injured in a collision between a train and a truck brought an FELA action against the railroad, which in turn impleaded the owner of the truck and the estate of the driver. In its third-party complaint, the railroad also asserted a claim against the nondiverse third-party defendants for damages to the locomotive in an amount less than the jurisdictional minimum. The Third Circuit relied on civil procedure rules 14 and 18(a) and the concept of ancillary jurisdiction, which it held was "broad enough to encompass this claim." 438 F.2d at 69; *accord Brooks v. Hickman*, 101 F.R.D. 19, 20 (W.D. Pa. 1984).

The Third Circuit drew from several authorities in reaching this conclusion. First, the court quoted Professor Wright's comments on the occasion of the 1966 amendment to rule 18(a):

> My hope would be that in determining [jurisdiction over additional third-party claims] the court would look to the factual relation between the third-party claim and the independent claim of the defendant. . . .
>
> [I]f the factual relationship is as close as in the example . . . where the claim . . . arises out of

> the very transaction which is the subject of the third-party claim, then it seems to me that within the existing knowledge about ancillary jurisdiction, [a court] ought to be able to [assert jurisdiction over the claim].

438 F.2d at 69 (quoting 42 F.R.D. at 560-61). The court also relied on the reasoning of a leading treatise:

> If the additional claim arises out of the same transaction or occurrence as the claim for liability over – and thus, by hypothesis as the original claim of plaintiff against defendant – it would seem, by analogy to principles settled in other areas, that the additional claim too should be treated as ancillary for purposes of jurisdiction and venue.

438 F.2d at 69-70 (quoting Barron & Holtzoff, 1A *Federal Practice and Procedure* § 426, at 43-44 (Supp. 1969)). Finally, the court described a similar approach taken by another commentator:

> If a defendant asserts a claim against a third-party defendant for contribution or indemnity, the defendant should be able to join with this claim a claim for damages for injuries which he received in the same transaction or occurrence. Since the third-party defendant is properly in the action, the original defendant should be able to plead all claims that arise out of the same transaction or occurrence in order to prevent several suits between the same parties on the same facts. Fraser, "Ancillary Jurisdiction and the Joinder of Claims in the Federal Court."

438 F.2d at 70 (quoting 33 F.R.D. 27, 39-40 (1963)).

The court found compelling the analogy to a compulsory counterclaim (which it believed was the object of Barron's & Holtzhoff's reference to "principles settled in

other areas"), given that the railroad's claim for damages "arises out of the same set of facts as the claim for liability-over, and since the third-party defendants could assert against [the railroad] a claim arising out of the transaction or occurrence which is the subject of the third-party claim." 438 F.2d at 71.

The Appellant here argues that the reasoning of *Schwab* was later discredited by *Owen Equipment*. Brief of Appellant at 31. According to the Appellant, *Schwab* failed to consider the second test established by *Owen Equipment* – logical dependence. We have already concluded that the Appellant overstates the holding of *Owen Equipment* and makes an unwarranted distinction between logical dependence and logical relationship. We also credit the *Schwab* court for acknowledging it was "furrowing new ground" in its interpretation of rules 14(a) and 18 and that a district court's discretion concerning the disposition of multiple claims in a single action was not unlimited. Presaging *Owen Equipment* and *Aldinger*, it observed that a court cannot enlarge its discretion "simply by characterizing a claim as 'pendent' and invoking the broad language of [*Gibbs*] which arose in a different context and involved additional considerations." 438 F.2d at 71. The Third Circuit distinguished *Gibbs* from *Schwab* as we have distinguished *Owen Equipment* and *Aldinger* from this case: There, as here, ancillary jurisdiction had already attached by virtue of impleader. 438 F.2d at 71 n.20.[10]

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[10] The Ninth Circuit later approved the result in *Schwab* but faulted the Third Circuit's suggestion that a third-party claim may come within the ancillary jurisdiction of the court because it is ancillary to another ancillary claim. *United States*

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The standard treatises continue to rely on *Schwab* after *Owen Equipment* for the general proposition that the ancillary jurisdiction of the federal courts encompasses a state-law claim arising out of the same transaction or occurrence as a third-party impleader claim. *See, e.g.*, A. Wright & C. Miller, § 1452, at 118 (1989 Supp.). Moreover, Appellee Hanson argues persuasively that *Schwab* and similar cases are consistent with the general principles of ancillary jurisdiction recognized in the Tenth Circuit. Brief of Appellee at 15; *see, e.g., Jenkins v. Weinsheink*, 670 F.2d 915, 918 (10th Cir. 1982) (ancillary jurisdiction rests on the premise that a federal court acquires jurisdiction of a case or controversy in its entirety); *United States v. Major Oil Corp.*, 583 F.2d 1152, 1160-61 (10th Cir. 1978); *United States v. Acord*, 209 F.2d 709, 712 (10th Cir.) (regarding ancillary jurisdiction over third-party claims), *cert. denied*, 347 U.S. 975 (1954). Thus, we do not believe *Owen Equipment* undermined the sound reasoning of *Schwab*.

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ex rel. Payne v. United Pacific Ins. Co., 472 F.2d 792, 795 & n.9 (9th Cir.), *cert. denied*, 411 U.S. 982 (1973) (referring to the statement in *Schwab* that "[f]or the purposes of jurisdiction . . . we believe that Erie's separate claim should survive, whether its claim be characterized as ancillary to the main claim or ancillary to the third-party claim which itself is ancillary to the original claim against the railroad," 438 F.2d at 70 (footnote omitted)). The Fifth Circuit, however, in *Nishimatsu Construction Co. v. Houston Nat'l Bank*, 515 F.2d 1200 (1975), appeared to agree with the disputed suggestion in *Schwab*. The court held that the added third-party claim "[fell] outside the pale of ancillary jurisdiction" because it "lack[ed] the *requisite* logical relationship *either* to the main claim *or* to the bank's impleader claim." 515 F.2d at 1205 (emphasis added).

The Fifth Circuit is basically in step with the Third. It views an added third-party claim as ancillary if it " 'bears a logical relationship to the aggregate core of operative facts which constitutes the main claim over which the court has an independent basis of federal jurisdiction.' " *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1205 (5th Cir. 1975) (quoting *Revere Cooper & Brass, Inc. v. Aetna Casualty & Surety Co.*, 426 F.2d 709, 714 (5th Cir. 1970)). It defines "logical relationship" as:

> "aris[ing] out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate of operative facts serves as the basis of both claims; or (2) that the aggregate core of facts upon which the original claim rests activates additional legal rights in a party defendant that would otherwise remain dormant."

515 F.2d at 1205 (quoting *Revere Copper*, 426 F.2d at 715). The Fifth Circuit suggests, as did the Third Circuit in *Schwab*, that ancillary jurisdiction of the additional claim may rest on the logical relationship of that claim to either the main claim or the (already ancillary) impleader claim. 515 F.2d at 1205.

The Fourth Circuit, in an opinion that predated *Schwab* and the amendment of rule 18(a), adopted a stance consistent with that later assumed by the Third Circuit. *See Noland Co. v. Graver Tank & Mfg. Co.*, 301 F.2d 43 (4th Cir. 1962). The circumstances of *Noland* are not on all fours with this case;[11] nevertheless, we find the court's

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[11] Lack of diversity was not a problem in *Noland*, but the amount in controversy appeared to be less than the jurisdictional minimum. The court did not address that issue,

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reasoning useful because of the similarity of the contract disputes. The third-party plaintiff in *Noland* sought not only indemnification to the extent of any recovery awarded the plaintiff against it, but also a recovery for its own loss of anticipated profit. In holding that the district court had jurisdiction of the lost profits claim, the Fourth Circuit panel explained:

> [T]he profit issue is not, in any way, complicated; . . . a determination thereof would not have been unduly burdensome to any party litigant; . . . the litigation would not have been appreciably prolonged by such determination. . . .[Th]e facts supporting Noland's ancillary claim for loss of anticipated profit are substantially the same as those developed in the trial of the primary questions. . . .

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however, and a subsequent Fourth Circuit district court opinion, *Gebhardt v. Edgar*, 251 F. Supp. 678 (W.D. Pa. 1966), declined to follow *Noland*, holding there was no independent basis of jurisdiction for the third-party plaintiff's claim for damages for his own injuries against the nondiverse third-party defendant. We find the analysis in *Schwab* more persuasive. We also note that the court in *Gebhardt* relied partly on an earlier version of Barron & Holtzoff, the treatise quoted in *Schwab*, in which the authors concluded there was "no authorization" for a third-party plaintiff to join other claims he may have against the third-party defendant. 251 F. Supp. at 681. The court apparently overlooked the fact that in the later edition of the treatise cited in *Schwab* (written after the amendment of rule 18), the authors concluded that, "by analogy to principles settled in other areas," the additional claims should also be considered ancillary. 438 F.2d at 69 (quoting 1A Barron & Holtzoff, *Federal Practice and Procedure* § 426, at 43-44 (Supp. 1969)).

. . . .

> One of the primary objectives of third-party procedure is to avoid circuity and multiplicity of actions.

301 F.2d at 49-50.

The most recent (and novel) attempt by a circuit court to resolve the issue we face today is that of the Ninth Circuit in *United States v. City of Twin Falls, id.*, 806 F.2d 862 (1986), *cert. denied*, 482 U.S. 914 (1987). The factual situation generally resembles ours: Twin Falls was sued by the Environmental Protection Agency for violating federal water pollution control statutes. The City impleaded Envirotech Corporation and others responsible for the design and installation of the city water treatment plant (the alleged source of the violations). The City also asserted additional claims for damages arising from the need to repair or replace the treatment plant caused by Envirotech's negligence and breach of warranties. The City and Envirotech were diverse; however, there were other third-party defendants defeating diversity. 806 F.2d at 866.

Envirotech appealed the trial court's ruling that it had ancillary jurisdiction of the City's third-party claims, arguing that the claims were pendent party claims and that because of the lack of complete diversity there was no independent basis of federal subject matter jurisdiction. *Id.* The City argued that once the court properly exercised its ancillary jurisdiction with respect to the City's rule 14(a) claim, it also possessed pendent jurisdiction of the City's additional damage claims under rule 18(a). *Id.*

The *Twin Falls* court held that pendent jurisdiction supported the City's contract and tort claims. The court never directly addressed the difficulty posed by the absence of diversity, relying instead on a new adaptation of the Ninth Circuit definition of "pendent claim," i.e., "state claims which arise from the same 'nucleus of operative facts' as that of a federal claim and which are joined in the same complaint with the federally cognizable claim by the original plaintiffs against the original defendants." 806 F.2d at 867 (quoting *Blake v. Pallan*, 554 F.2d 947, 956-57 n.11 (9th Cir. 1977)). After establishing that the City's indemnity claim was ancillary to the "federally cognizable claim" (EPA's claim against the City), the court proceeded with its novel analysis:

> Viewing the City as the "original plaintiff" in its third-party action against Envirotech as the "original defendant," the City's contract and warranty claims are state claims arising from the same nucleus of operative facts as the indemnity claim, and thus are pendent to its ancillary claim.

806 F.2d at 867.[12] Without discussion, the court cited *Schwab* and *Noland* as according with its conclusion that

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[12] The Ninth Circuit's upholding of ancillary jurisdiction in *Twin Falls* has been questioned by a panel of the Seventh Circuit for what that court termed *Twin Falls's* inexact analogy to compulsory counterclaim. *Hartford Accident & Indem. Co. v. Sullivan*, 846 F.2d 377, 381 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 2428 (1989). (The *Sullivan* court also questioned the results in *Mayer Paving & Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763, 772 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974) and *Revere Copper*, 426 F.2d at 716, on the same ground.) The

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pendent jurisdiction supported the additional third-party claims.

The *Twin Falls* court distinguished *United States ex rel. Payne v. United Pacific Insurance Co.*, 472 F.2d 792 (9th Cir.), *cert. denied*, 411 U.S. 982 (1973) (hereinafter *Payne*), where it had held the additional claims asserted by the third-party plaintiff were not supported by ancillary jurisdiction. The third-party plaintiff in *Payne*, a surety sued by a subcontractor (Payne) who was not paid by his contractor for his work, impleaded the contractor and also joined other claims against the contractor on performance bonds involving other projects (projects not involving Payne, the original plaintiff). The Ninth Circuit held that, unlike in *Schwab*, there was

> no close nexus between the third-party claim and the original suit by Payne. . . .Regardless of the success or failure of Payne's suit, United's

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Sullivan court observed that the filing of a compulsory counterclaim "is in a sense involuntary" because a defendant who fails to plead such a claim may be barred from bringing it in a separate state action, 846 F.2d at 381, while "impleader clearly is voluntary," *id.* at 382. The court concluded instead that analogy to *permissive* counterclaim was proper, at least under the circumstances of *Sullivan*. *Id.*

The *Sullivan* court's view of ancillary jurisdiction is narrow. It declined even to concede the ancillarity of an impleader claim, holding that whether the claim arises from the same transaction or occurrence as the main claim "is the proper test to use in determining which Rule 14(a) claims are within the federal courts' ancillary jurisdiction if the doctrine is narrowly construed in the impleader setting, as we think it should be." *Id.*

> claim against [the third-party defendants] would persist entirely independently. The fact that the third-party claim arose from the same general background does not suffice as a nexus.

472 F.2d at 795.[13]

While we agree with the results in *Twin Falls* and *Payne*, we find the Ninth Circuit's "original plaintiff" approach in *Twin Falls* unnecessary and more puzzling than helpful.[14] It is our impression the Ninth Circuit

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[13] Curiously, the *Payne* court also failed to address the absence of diversity between the third-party litigants. After observing that the result in *Schwab* was, on its facts, "undoubtedly correct," the court proceeded to stress the strong relationship between the principal and disputed claims in that case. But the court ignored the *Schwab* court's discussion of the no-diversity jurisdictional hurdle. 472 F.2d at 795.

[14] Indeed, the Ninth Circuit contributed to the confusion in a subsequent opinion. In a case involving questions of ancillary and pendent jurisdiction in the context of cross-claims and joinder of parties under Fed. R. Civ. P. 13(h), the court stated that *Twin Falls* had treated the "third-party complaint under Fed. R. Civ. P. 14(a) as an 'original' complaint for purposes of ancillary jurisdiction." *Danner v. Himmelfarb*, 858 F.2d 515, 522 (9th Cir. 1988). This is not technically correct. The *Twin Falls* court did treat the third-party complaint as an "original" complaint (or at least the third-party plaintiff as an "original" plaintiff), but it distinguished between the defendant's third-party indemnity claim under rule 14(a), over which it held there was *ancillary* jurisdiction, and the defendant's additional damages claims joined under rule 18(a), which it ruled were supported by *pendent* jurisdiction.

In our view further obfuscating matters, the *Danner* court addressed the jurisdictional questions raised by the case via two analytical theories. Under the first, which adhered to

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would have reached the same result in *Twin Falls* had it followed the Third Circuit's (more traditional) approach in *Schwab*. We do not subscribe to the "original plaintiff" analogy, nor do we believe that analytical technique is necessary to the resolution of the jurisdictional issue in these cases. The foregoing cases from other circuits and the following district court opinions corroborate that conclusion.

Two district courts within this circuit have reached the conclusion we reach today on the basis of similar facts. In *United of Omaha Life Ins. Co. v. Reed*, 649 F. Supp 837, 842 (D. Kan. 1986), United sought a declaration of its liability under a policy issued to defendant Reed. Reed counterclaimed, seeking payment under its policy, and also filed a third-party complaint against the insurance company's agent, asserting similar claims as well as additional claims for damages. There was no diversity between Reed and the agent, and the agent moved for

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traditional, if abstract, definitions of pendent claims and ancillary jurisdiction, the court held that the cross-claims fell within the district court's ancillary jurisdiction. 858 F.2d at 521. Its second approach, modeled on *Twin Falls*, viewed the cross-claimant "as the plaintiff for purposes of the separate trial on his cross-claim," thus rendering it "possible . . . to treat [the] cross-claims and joinder of additional parties solely as a matter of pendent jurisdiction." 858 F.2d at 522. The court reached the same result in each analysis and concluded, as has the Supreme Court, that it was unnecessary in this case "to decide 'whether there are any "principled" differences between pendent and ancillary jurisdiction.' " 858 F.2d at 523 (quoting *Owen Equipment*, 437 U.S. at 370 n.8)). We are baffled by the *Danner* panel's approach and conclude it does not advance the goal of defining the contours of ancillary jurisdiction.

dismissal of the third-party complaint on grounds that, *inter alia*, the court lacked subject matter jurisdiction.[15]

With respect to the propriety of the additional third-party claims asserted by Reed, the court reasoned:

> The general rule is that once a court has determined that a proper third party claim has been asserted, it should allow joinder [under Fed. R. Civ. P. 18(a)] of any other claims the third party plaintiff may have against the third-party defendant. . . .[T]he requirement of subject matter jurisdiction . . . is met if the additional claim arises out of the same transaction or occurrence as the initial claim for liability.

649 F. Supp. at 842 (citing 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1452, at 95 (Supp. 1986)); *Executive Fin. Servs. v. Heart Chec, Inc.*, 95 F.R.D. 383, 384 (D. Colo.

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[15] To reach the issue of the propriety of the additional claims,the court made two preliminary determinations. First, adopting the reasoning of Professors Wright, Miller, and Moore (quoted earlier in the text of our opinion), the court found that it had ancillary jurisdiction of the insured's third-party pass-through claim, despite the absence of diversity. The court ruled that *Owen Equipment* was inapposite because it "held only that, in an action based on diversity of citizenship, an independent basis for federal jurisdiction must exist in order for the [original] *plaintiff* to assert a claim against the third party defendant." 649 F. Supp. at 840 (emphasis in original). Next, the court rejected the agent's contention that the third-party claim was not proper under rule 14(a) because it sought monetary damages while the initial suit was for a declaratory judgment. The court held that the third-party complaint was proper, given the substantial similarity of the facts relevant to both claims and that exercise of jurisdiction would promote judicial economy and not be unfair to the third-party defendant. 649 F. Supp. at 841-42.

1982). *See also Seitter v. Schoenfeld*, 678 F. Supp. 831, 838 (D. Kan. 1988) (citing 3 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶14.03(3) (2d ed. 1987) ("concept of ancillary jurisdiction also properly justifies taking jurisdiction over an additionally joined claim of the third party plaintiff against the third party defendant, provided the additionally joined claim is sufficiently related to the original claim to be deemed ancillary").[16]

The Kansas district court ruled that jurisdiction of Reed's "additional or alternative claim for misrepresentation" against the agent was proper, in that "this added claim arises out of the same transaction, i.e., the insurance policy and negotiations concerning the policy." 649 F. Supp. at 842. For reasons not relevant here the court held that other claims asserted by Reed would be dismissed.

In accord with *Reed* is the opinion of the district court for Colorado in *Heart Chec*, 95 F.R.D. at 384. The defendants in *Heart Chec* were sued for breach of a lease. They filed a third-party complaint against their lawyers who prepared the lease agreement, seeking to recover any

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[16] *Seitter* is not particularly helpful to our analysis, however. There, once the Kansas district court determined the third-party defendant had been properly impleaded under rule 14(a), it held the third-party plaintiff's independent claims for breach of contract, breach of warranty, and misrepresentation were within its ancillary jurisdiction. 678 F. Supp. at 837-38. The court apparently did not test the relation of those independent claims to the third-party plaintiff's indemnity claim or to the claim in the original action. It also was not clear from the opinion whether the third-party litigants were diverse.

amount for which they might be held liable to the plaintiff, as well as additional compensatory and punitive damages. All of the third-party litigants were residents of Colorado.

Judge Weinshienk stated the test for determining whether a court has ancillary jurisdiction of an additional third-party claim as "whether the claim involves the same core of facts as the original claim, and whether both arise out of the same transaction." 95 F.R.D. at 384 (citing *Schwab*, 438 F.2d at 68-71, and *Payne*, 472 F.2d 792). The court easily found that all claims arose from a common transaction, the lease agreement. It further concluded that the purposes of ancillary jurisdiction – " 'to prevent the relitigation in other courts of the same issues . . . ' and to promote the economical and expeditious administration of justice by avoiding a multiplicity of suits" – would be accomplished by permitting the defendants to litigate their claims in one suit. 95 F.R.D. at 384 (quoting *Payne*, 472 F.2d at 794). Accordingly, the court held that the additional damages claims were ancillary to the principal claim.

We hold that the weight of authority and the better-reasoned cases support our conclusion that the district court's ancillary jurisdiction encompassed all of Hanson's third-party claims. Having exercised its ancillary jurisdiction over Hanson's proper rule 14(a) indemnity claim against Langan, it was within the court's power and its discretion also to hear and decide Hanson's delay damages claim against Langan, given that that claim arose from the same transaction or occurrence as the principal claim by King Fisher against Hanson. This result, true to the constitutional and statutory limits on the federal

courts' jurisdiction, is also consistent with the notions of judicial economy and common sense from which the judge-made doctrine of ancillary jurisdiction took root. To confine the district court's jurisdiction here so as to exclude the added third-party claim would be to thwart the court's ability "effectively to resolve an entire, logically entwined lawsuit." *Owen Equipment*, 437 U.S. at 377. We have found no evidence that Congress intended such a constraint.

C. District Court's Discretion to Decide Third-Party Claims

Having determined that the district court had jurisdiction of Hanson's third-party claims against Langan in the first instance, it is next necessary to consider whether the subsequent settlement of King Fisher's claim against Hanson deprived the court of jurisdiction of the ancillary claims. The district court held it did not lose its power to decide the third-party claims after the plaintiff's cause of action was settled. 717 F. Supp. at 729. Moreover, in light of the facts that Langan had made no claim of unfairness and the time already spent on the case, the trial court believed it did not abuse its discretion in retaining the third-party claims. *Id.* (citing *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir.) *cert. denied*, 459 U.S. 880 (1982); *Transok Pipeline Co. v. Darks*, 565 F.2d 1150 (10th Cir. 1977) *cert. denied*, 435 U.S. 1006 (1978).

We agree with the district court, finding the weight of authority is that, "if jurisdictional prerequisites are satisfied when the suit is begun, subsequent events will not work an ouster of jurisdiction." *Dery v. Wyer*, 265 F.2d

804, 808 (2d Cir. 1959); *see 3 Moore's Federal Practice* ¶14.26, at 14-113 (2d ed. 1989). *But see Danner v. Himmelfarb*, 858 F.2d 515, 523 (9th Cir. 1988) ("it is our practice to dismiss state law claims once the federal claim has been resolved"). "[A] rule that ancillary jurisdiction of a third-party claim terminates on a determination of the main claim [would] seriously impair the utility of the Rule, breed confusion and generate many sterile jurisdictional disputes." 265 F.2d at 809 (quoted in *Moore's Federal Practice* ¶14.26, at 14114). The principle applies as well when the main claim has been settled, as was the case here, or dismissed on its merits. *See, e.g., Nishimatsu*, 515 F.2d at 1204-05, 1204 n.2; *Pennsylvania R.R. Co. v. Erie Ave. Warehouse Co.*, 302 F.2d 843, 846 (3d Cir. 1962). As the Second Circuit observed in *Dery*, to hold otherwise would have the undesirable result of discouraging settlements. 265 F.2d at 808.

Because ancillary jurisdiction is a "doctrine of discretion," *Danner*, 858 F.2d at 523; *cf. United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966), it is axiomatic that it was within the district court's discretion to retain or dismiss Hanson's third-party claims after the settlement of the main claims. The factors relevant to that decision have been summarized elsewhere. *See, e.g., Dery*, 265 F.2d at 808-09; *Twin Falls*, 806 F.2d at 868; C. Wright & A. Miller, § 1444, at 234-37 (1971), 97-98 nn.1-2 (1989 Supp.). We find that the interests of "judicial economy, convenience, and fairness," *Gibbs*, 383 U.S. at 726, were served here by the district court's exercise of jurisdiction. We note also Hanson's state claims may have been time-barred if the district court had dismissed them following

settlement of the principal claims. Under these circumstances, we hold the district court was within its discretion in hearing and deciding the contested third-party claim.

Because we find that the district court properly exercised jurisdiction of the contested claim, we deny the relief requested under Fed. R. Civ. P. 60(b)(4). The judgment of the district court is **AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KING FISHER MARINE SERVICE, INC., a Texas corporation, Plaintiff, vs. THE HANSON DEVELOPMENT COMPANY, a Delaware corporation, Defendant and Third Party Plaintiff, vs. LANGAN ENGINEERING ASSOCIATES, INC., a corporation, and HIGHLANDS INSURANCE COMPANY, a Texas corporation, Third Party Defendants.	Case No. T-5258 (Filed Sept. 8, 1987)

MEMORANDUM AND ORDER

This case is now before the court upon a motion to vacate judgment and dismiss the third-party petition. The movant is third-party defendant Langan Engineering Associates, Inc. ("Langan"). The defendant that received the judgment Langan seeks to vacate is 21st Phoenix Corporation, formerly the Hanson Development Company ("Hanson"). Plaintiff is King Fisher Marine Service, Inc. ("KFMS").

This case was filed in 1972 by KFMS in the state district court of Sedgwick County, Kansas. The case arises

from a contract between KFMS and Hanson for dirt work at a shopping center site in Wichita, Kansas. Under the agreement, KFMS was to finish the dirt work within seven months of receiving notice to commence operations. Hanson had hired Langan to conduct site evaluation, planning and contract supervision in connection with the project. The suit by KFMS sought $64,836.80 on the contract; $16,974.00 in additional expenses resulting from mutual mistake of fact; and $45,867.50 in delay damages not contemplated by the contract. Approximately one month after the suit was filed in state court, Hanson sought to remove the case to this court on the grounds of diversity jurisdiction. KFMS was a Texas corporation; Hanson had its principal place of business in New Jersey. The case was removed to this court and Hanson then filed an answer with a counterclaim against KFMS for delay in completion of the project. The counterclaim was for the amount of $136,395.00.

On December 14, 1973, Hanson moved for leave to file an amended answer, counterclaim and third-party complaint in order to join Highlands Insurance Company on its counterclaim against KFMS and to implead Langan as a third-party defendant. The amended answer asserted an ancillary claim that Langan was liable for any damages found in favor of KFMS against Hanson. It further asserted a claim for damages in excess of the ancillary claim to the effect that if KFMS was not liable for the delay damages asserted in the counterclaim, then Langan was responsible for such damages. Plaintiff opposed the amended answer, but Judge Templar rejected such opposition and permitted the amended answer to be filed.

Langan filed an answer to the third-party complaint, making no challenge as to this court's jurisdiction. As part of its answer, Langan asserted a counterclaim against KFMS. The counterclaim asserted that KFMS was responsible for the delay damages alleged by Hanson in the third-party complaint.

On January 23, 1978, local counsel for Langan withdrew and Langan was directed to retain other local counsel. On January 16, 1979, several months after an initial trial setting, a second trial notice was sent to counsel. On February 13, 1979, this court sustained a motion to withdraw from Langan's remaining counsel. The court indicated that this action would not alter the trial setting. The trial went forward on April 9, 1979, but Langan did not appear. The court was informed that KFMS, Hanson and Highlands Insurance Company had reached a settlement of the claims against each other. The settlement required Hanson to pay KFMS $60,000.00 plus interest. The court approved this settlement and permitted Hanson to proceed with its third-party claim against Langan. Evidence and argument was considered with regard to the third-party claim. On April 11, 1979, the court filed a journal entry approving the settlement between Hanson and KFMS and awarding Hanson a judgment against Langan for $155,703.50, an amount obviously in excess of the ancillary claim.

No appeals were taken. But, on October 3, 1983, Langan filed a motion to set aside the judgment against it on the grounds that Langan had no notice of the trial date or the entry of judgment. This court denied the motion and the Tenth Circuit Court of Appeals later affirmed that decision. On November 13, 1985, the instant motion to

vacate judgment was filed. In this motion, the first challenge to subject matter jurisdiction was made.

The motion to vacate is predicated on the fact that Langan and Hanson were not diverse parties. Both parties had their principal places of business in New Jersey. The third-party complaint does not raise claims under federal statutes. Therefore, no independent jurisdictional anchor existed for Hanson's claims against Langan. Langan had an ancillary claim under FED.R.CIV.P. 14(a) for any sum for which it was held liable to KFMS. Tied to the ancillary claim were claims for delay damages in excess of the ancillary claim. Langan does not contest this court's ancillary jurisdiction over the impleader claim brought under Rule 14. However, this court granted judgment in favor of Hanson on the excess claims. The issues currently before this court are: whether this court had jurisdiction to decide the excess claims; whether this court should have exercised that jurisdiction; and whether the jurisdiction of this court can now be attacked upon a Rule 60(b)(4) motion.

The parties have submitted thorough briefs on these questions. While the court has given the briefs and the authorities cited therein careful attention, this opinion will not attempt to review each citation and argument on the issues presented for decision. Indeed, this opinion shall not attempt to decide whether Langan's arguments are properly heard at this juncture via a Rule 60 motion. The conflict of authority on this issue is reflected by contrasting *Nemaizer v. Baker*, 793 F.2d 58 (2d Cir. 1986) with *Collins v. Foreman*, 729 F.2d 108 (2d Cir. 1984). In *Nemaizer*, the court held that only actions which "plainly usurp jurisdiction" can be challenged under Rule 60(b)(4)

and that "a court will be deemed to have plainly usurped jurisdiction only when there is a 'total want of jurisdiction' and no arguable basis on which it could have rested a finding that it had jurisdiction." 793 F.2d at 65. In *Collins*, the same circuit court considered the merits of a Rule 60(b)(4) motion which challenged a judgment rendered by a magistrate on the grounds that the statute authorizing magistrates to render such judgments was unconstitutional and, therefore, the magistrate lacked subject matter jurisdiction. Obviously, the magistrate did not plainly usurp jurisdiction. Nevertheless, the court gave the constitutional issue complete consideration. We have not found a Tenth Circuit case which clearly decides when subject matter jurisdiction can be challenged under Rule 60(b)(4).

Assuming that Langan's jurisdictional challenge is properly made at this time, the court believes that it had the jurisdictional authority and did not abuse its discretion in exercising that authority when it rendered the judgment which Langan seeks to vacate. A line of cases has approved the taking of jurisdiction over an additionally joined claim of a third party plaintiff against a third party defendant when the additional claim is sufficiently related to the ancillary claim. *United States v. City of Twin Falls, Idaho*, 806 F.2d 862 (9th Cir. 1986); *Schwab v. Erie Lackawanna Railroad*, 438 F.2d 62 (3d Cir. 1971); *Noland Company v. Graver Tank & Manufacturing Co.*, 301 F.2d 43 (4th Cir. 1962); *Brooks v. Hickman*, 101 F.R.D. 19 (W.D.Pa. 1984); *Executive Financial Services, Inc. v. Heart Chec, Inc.*, 95 F.R.D. 383 (D.Colo. 1982); see also, *Ruckman & Hansen, Inc. v. Contracting & Material Co.*, 328 F.2d 744 (7th Cir. 1964).

Langan has not seriously contested some of the discretionary factors which are considered when federal courts exercise jurisdiction over a state law claim. The additional claims made by Hanson against Langan come from a nucleus of facts common to the other claims in the lawsuit so that judicial economy and convenience was served by considering all the claims together. No unfairness from the exercise of jurisdiction has been asserted by Langan. Moreover, as Hanson notes, the exercise of jurisdiction promoted Hanson's statutory removal rights by not forcing Hanson to choose between defending against plaintiff's claims in state court and bringing closely related claims against Langan. Some reference has been made to the "settlement" of the main claim in this case prior to the decision on Hanson's third-party claims. The court did not lose its power to decide the third-party claims after the "settlement" of the plaintiff's cause of action and, given the time spent on the case, the exercise of the court's power to hear the third-party claims was not an abuse of discretion. See *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir.) *cert. denied*, 459 U.S. 880 (1982); *Transok Pipeline Co. v. Darks*, 565 F.2d 1150 (10th Cir. 1977) *cert. denied*, 435 U.S. 1006 (1978).

Langan's main argument is that the diversity claim between plaintiff and KFMS and Hanson or the ancillary impleader claim brought by Hanson against Langan is not a sufficient jurisdictional anchor for Hanson's additional claims. Langan relies upon the holding in *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978) to support its argument. However, the facts of *Kroger* are distinguishable from those of the instant case. *Kroger* involved a plaintiff who amended a complaint to bring a

claim against a nondiverse party who had been added to the case previously as a third-party defendant. If this exercise of jurisdiction had been approved in *Kroger*, then, contrary to statute, plaintiff would have been allowed to bring a state law claim in federal court against a nondiverse party. Furthermore, the potential would be created for plaintiffs to avoid the normal diversity requirements by suing diverse defendants in federal court and waiting for them to bring in nondiverse parties on third-party petitions. It was argued that the exercise of jurisdiction was proper because the third-party defendant had been properly added to the suit through an impleader action. But, in *Kroger*, there was no logical dependence between plaintiff's claim against the third-party defendant and the other claims in the suit. Moreover, plaintiff chose the federal forum; she had the opportunity to bring all her claims in state court had she so chosen.

In the instant case, this court had the constitutional power to decide all of Hanson's claims against Langan. The claims arose from a common nucleus of facts. The court also had the statutory authority to decide these claims. The Congressional demand for complete diversity was not circumvented by the exercise of jurisdiction. The plaintiff, KFMS, and defendant, Hanson, were of diverse citizenship. While the third-party plaintiff and third-party defendant were not of diverse citizenship, the courts have not construed the diversity statute to require such diversity as long as the third-party plaintiff brings a claim which is logically dependent upon the outcome of the main action. Of course, in the instant case, other claims were made which were not logically dependent on the main action, although they were logically related to

the main action. The court believes this logical relationship was sufficient to trigger the court's statutory jurisdictional authority because it permitted the resolution of "an entire, logically entwined lawsuit" (437 U.S. at 377) as Congress would have intended. Moreover, as stated previously, the exercise of jurisdiction promoted statutory removal rights. Therefore, although Hanson chose the federal forum in this case, the course taken by this court did not force Hanson to choose between removal and an efficient resolution of all the claims in this matter.

For these reasons, the court believes this case is distinguishable from *Kroger* and that this court had the constitutional and statutory authority to exercise jurisdiction as have other courts in similar situations. Furthermore, the court is not convinced that its exercise of jurisdiction was an abuse of discretion. Accordingly, even assuming that the jurisdictional challenge of Langan is permitted under Rule 60(b)(4), the challenge is without merit.

IT IS THEREFORE ORDERED that the motion to vacate and dismiss be denied.

IT IS SO ORDERED.

Dated this 4th day of September, 1987 at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

CIRCUIT COURT DECISIONS
Third-Party Ancillary Jurisdiction
(complete diversity lacking)

Circuit	Broad (*Gibbs*)	Narrow (*Owen & Finley*)
1.		*Otero* (1979), p. 13
3.	*Schwab* (1971), p. 16	[questionable after *Owen*]
5.	*Revere* (1970) [disavowed after *Owen*; see *Travelers*]	*F.O. Majors* (1970), p. 18 *Nishimatsu* (1975), p. 17 *Travelers* (1982), p. 12 *Birmingham Fire* (1983), p. 19
7.		*Hartford/Sullivan* (1988), pp. 15-16, 18
9.		*Payne* (1973), p. 18
10.	*King Fisher* (1990)	
11.		*Eagerton* (1983), p. 13

(Page numbers refer to citation in the Petition)